

University of Rio Grande and United Mine Workers of America, AFL-CIO, CLC. Case 9-CA-35708

April 13, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
BRAME

Pursuant to a charge filed on February 13, 1998, the General Counsel of the National Labor Relations Board issued a complaint on February 18, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 9-RC-16906. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and submitting affirmative defenses.

On March 5, 1998, the General Counsel filed a Motion for Summary Judgment. On March 10, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On March 24, 1998, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's disposition of certain challenged ballots. The Respondent contends that the decision of the Region and the Board to not open and count the ballot of Michael Snider was erroneous because he was employed as a unit employee prior to the eligibility payroll cutoff date.

In its response to the notice, the Respondent argues that recent findings by the Internal Revenue Service (IRS) shed light on the eligibility of the "contracted services" employees. The Regional Director's Decision and Direction of Election found that these employees do not have sufficient community of interest with the unit employees to warrant their inclusion in the bargaining unit. The Respondent did not request review of that decision. Thereafter, when challenges were determinative, a hearing was held as to five determinative challenges, one of whom had been a "contracted service" employee. As to that ballot, the hearing officer decided Michael Snider had been a contracted service employee who was offered permanent

part-time employment after the preelection hearing but who did not begin that work until after the eligibility date for the election. In exceptions to the hearing officer's report, the Respondent argued that Snider should have been included in the unit as a contracted service employee, a position that the Regional Director rejected because the Respondent did not request review of the Decision and Direction of Election. The Regional Director also held that Snider was not eligible to vote because he began work as a permanent part-time employee after the eligibility date. The Board denied the Respondent's request for review of that decision.

The Respondent now argues that the IRS has concluded that the contract service workers are employees and that they must be paid as employees rather than as independent contractors. The Respondent contends that this ruling affects their eligibility to vote and, had they been permitted to vote, their votes could have affected the outcome of the election.

The Respondent's contention that we should reopen the representation case because of the IRS ruling must be rejected for three reasons. First, the IRS decision was based on facts, viz, the employment conditions of the contracted service employees that were well known to the Respondent at the time of the hearing. The only new fact arising since the representation hearing is the IRS ruling, and such facts are not "newly discovered" evidence. See *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 278 (1st Cir. 1997), enfg. 321 NLRB 916 (1996) ("facts which *arise* only after the hearing has been concluded and the record closed are irrelevant"). Second, the Regional Director did not exclude these individuals because they were not employees within the meaning of Section 2(3) of the Act. Rather, the Regional Director assumed that status but concluded they did not share a sufficient community of interest with the unit employees warranting their inclusion in the unit. For these same reasons, we cannot find that the IRS ruling is a special circumstance warranting reopening of the representation case. As noted, the facts on which the IRS relied were well known to the Respondent at the time of the hearing and the Regional Director's decision did not challenge the Section 2(3) status of the "contracted service" employees.

Third, we also find that because the Respondent did not request review of the Regional Director's Decision and Direction of Election, it is now precluded from attacking the Regional Director's decision to exclude the contracted service employees. See *Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760 (3d Cir. 1997), enfg. 321 NLRB 659 (1996).

We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been engaged in the operation of an institution of higher learning at Rio Grande, Ohio. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its operations described above, derived gross revenues, excluding contributions which because of limitation by the grantor are not available for operating expenses, in excess of \$1 million and purchased and received at its Rio Grande, Ohio facility goods valued in excess of \$10,000 directly from points outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held August 9, 1997, the Union was certified on October 10, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time hourly employees, including maintenance employees, clerical employees, secretaries, groundskeepers, child development teachers and assistant teachers, accounting clerks, the crossroad computer specialist, the tech prep secretary and print shop employees employed by [Respondent] at its Rio Grande, Ohio facility, excluding all confidential employees, managerial employees, work study student employees, student labor employees, contracted service employees, athletic coaches, counselors, salaried administrators and assistant administrators, directors, assistant directors, registered nurses, faculty members and all other professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since December 3, 1997, the Union, by letter, has requested the Respondent to bargain and, since December 9, 1997, the Respondent, by letter, has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after December 9, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, University of Rio Grande, Rio Grande, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Mine Workers of America, AFL-CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time hourly employees, including maintenance employees, clerical employees, secretaries, groundskeepers, child development teachers and assistant teachers, accounting clerks, the crossroad computer specialist, the tech prep secretary and print shop employees employed by [Respondent] at its Rio Grande, Ohio facility, excluding all confidential employees, managerial employees, work study student employees, student labor employees, contracted

service employees, athletic coaches, counselors, salaried administrators and assistant administrators, directors, assistant directors, registered nurses, faculty members and all other professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Rio Grande, Ohio, copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 9, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Mine Workers of America, AFL-CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time hourly employees, including maintenance employees, clerical employees, secretaries, groundskeepers, child development teachers and assistant teachers, accounting clerks, the crossroad computer specialist, the tech prep secretary and print shop employees employed by us at our Rio Grande, Ohio facility, excluding all confidential employees, managerial employees, work study student employees, student labor employees, contracted service employees, athletic coaches, counselors, salaried administrators and assistant administrators, directors, assistant directors, registered nurses, faculty members and all other professional employees, guards and supervisors as defined in the Act.

UNIVERSITY OF RIO GRANDE